

DOCKET FILE COPY ORIGINAL  
**RECEIVED**

JUL 10 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
)  
Petition for Expedited Rulemaking )  
To Establish Reporting Requirements and ) RM 9101  
Performance and Technical Standards for )  
Operations Support Systems )  
\_\_\_\_\_ )

**COMMENTS OF KANSAS CITY FIBERNET, INC.  
AND FOCAL COMMUNICATIONS CORPORATION  
IN SUPPORT OF PETITION FOR EXPEDITED RULEMAKING ON  
OPERATIONS SUPPORT SYSTEMS**

Kansas City Fibernet, Inc. and Focal Communications Corporation ("Focal"), submit these comments in support of the Petition for Expedited Rulemaking filed by LCI International Telecom Corp. ("LCI") and Competitive Telecommunications Association ("CompTel"), requesting the Commission to establish requirements for nondiscriminatory access by CLECs to the OSS functions of incumbent local exchange carriers.

Kansas City Fibernet is a telecommunications carrier providing high-capacity special access services to business customers in the Kansas City area. Kansas City Fibernet is also certificated in Missouri and Kansas to provide local exchange service but is not presently doing so. Its decision whether to enter the market will be significantly influenced by whether meaningful and enforceable standards can be established to prevent the incumbent local exchange carriers from engaging in the type of discriminatory practices described in the LCI and CompTel Petition. As long as this type of practice is allowed to continue, Kansas City Fibernet

believes it will be very difficult for any company to compete for customers.

Focal is a competitive local exchange carrier. Focal or its subsidiaries are certificated to provide local exchange service in Illinois and New York, and have an application pending in New Jersey. Where authorized to do so, Focal will provide local exchange and interexchange telecommunications services to business and residential customers by combining its own facilities with the unbundled network elements and wholesale services of incumbent local exchange carriers. Focal has started to provide local exchange service in Illinois over its own facilities. Although Focal has ordered trunks from Ameritech, Focal has not begun ordering unbundled network elements or wholesale services from Ameritech because Focal is well aware of the OSS problem other competitive carriers are experiencing.

The Petition filed by LCI and CompTel has a sound basis in law, and the establishment of requirements for OSS functions is urgently needed as a matter of national telecommunications policy.

As a matter of law, section 251(c)(3) of the Telecommunications Act of 1996 requires the ILECs to provide any requesting telecommunications carrier with “nondiscriminatory access to network elements.” 47 U.S.C. § 251(c)(3). As the Commission recognized in its Local Competition First Report and Order, OSS functions are included in “network elements,” since the Act defines “network element” to include “information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.” 27 U.S.C. § 153(29), quoted in First Report and Order ¶ 516.

The Petition points out that at least some Bell Operating Companies apparently believe their “nondiscrimination” obligation to mean only that they must not discriminate as between

CLECs requesting access -- that they are free to treat all requesting CLECs, as a group, worse than they treat themselves, so long as they do not “play favorites” among the CLECs. Petition at 3. But the Commission has already made it clear that nondiscrimination means more. It means that competing carriers must be able “to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for network elements and resale services in substantially the same time and manner that an incumbent can for itself.” First Report and Order ¶ 518 (emphasis added).

The Commission correctly interpreted the ILECs’ nondiscrimination obligation. Congress intended to insure that the CLECs seeking access to the incumbent networks have a fair opportunity to compete with the incumbent. Congress imposed the obligation of nondiscrimination to guarantee a parity of competitive opportunity with the incumbent. To interpret the obligation to guarantee parity as applying only as between the CLECs themselves, rather than guaranteeing parity with the incumbent as well, would completely ignore the Congressional intent.

The Commission’s announcement in the First Report and Order of the scope of the non-discrimination requirement should have been sufficient to set the ILECs on the right track. The deadline established for nondiscriminatory access to OSS was January 1, 1997. In its Second Order on Reconsideration the Commission refused to extend that deadline and reaffirmed its determination to require access to OSS “equal to the terms and conditions on which an incumbent LEC provisions such elements to itself or its customers” (¶ 9). Yet despite all this, the ILECs have failed to comply with their nondiscrimination obligation.

That is apparent from the complete failure of the ILECs to provide adequate OSS access

to competing carriers. As the Petition describes, there has been a broad failure by the ILECs to provide data in a form that permits competitive carriers to order and bill without manual intervention. It is inconceivable that the ILECs themselves require manual intervention in dealing with their own customers. Thus there can be no doubt that the ILECs are treating their competitors differently than they are treating themselves with respect to the all-important OSS function, in plain violation of the Act itself as well as the Commission's First Report and Order.

The ILECs will presumably argue that if they are in violation, the proper step for the Commission is to take enforcement action, rather than to issue another rule. But a massive number of enforcement actions would be necessary to address all the situations that have arisen and to define the ILECs' nondiscrimination obligation on a case-by-case basis. That would probably be beyond the resources of the Commission, and would certainly be beyond the resources of the CLECs, many of whom simply do not have the resources to support a lengthy enforcement campaign. Moreover, the delay caused by case-by-case litigation would itself discourage competition, keeping out small competitors without the resources to wait several years for meaningful access to the market, while enabling the ILECs to further entrench their competitive position.

The Act gives the Commission ample authority to deal with this situation. Section 4(i) of the Act gives the Commission authority to "make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). The Supreme Court has held that a regulation issued under this type of broad statutory authority "will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369 (1973),

quoting Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, 280-81 (1969).

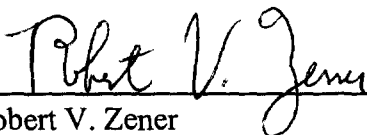
The relief requested by LCI and CompTel is clearly “related to the purpose” of the Telecommunications Act of 1996. By requiring each ILEC to disclose the performance standard it imposes on itself for each OSS function (where it has such a standard), and by establishing standards for each OSS function whether or not the ILEC has established one, the Commission would establish objective performance benchmarks. This would enable all parties to readily determine what was required, and would thus guarantee nondiscriminatory treatment without the necessity of establishing such standards on a case-by-case basis through lengthy and costly enforcement actions

The Supreme Court has said that broad statutory authority similar to Section 4(i) of the Act gives the agency “power to counteract attempts to evade the purposes of a statute.” Mourning v. Family Publications Service, Inc., *supra*, 411 U.S. at 370. The relief requested by LCI and CompTel would “counteract attempts to evade the purposes of [the Act].” The ILECs’ failure to live up to their nondiscrimination obligation is so clear that it can only be construed as an attempt to further delay implementation of the Congressional purpose to open the local exchange market to meaningful competition. The ILECs obviously calculate that by the time individual enforcement actions catch up with their tactics of delay, many would-be competitors will have given up, others will be discouraged from even attempting to enter the market, and the ILECs will at the very least have obtained additional time in which to entrench their competitive position. Section 4(i) gives the Commission ample authority to enforce the Act by means that counteract these evasive tactics.

## CONCLUSION

The Petition for Expedited Rulemaking should be granted. As requested in the Petition, the Commission should require the ILECs to disclose OSS functions for which they have performance standards and to disclose such standards, and the Commission should also establish its own performance standards for such functions as well as related OSS requirements.

Respectfully submitted,

A handwritten signature in cursive script, reading "Robert V. Zener", is written over a horizontal line.

Robert V. Zener

Tamar E. Haverty

SWIDLER & BERLIN, CHARTERED

3000 K Street, N.W., Suite 300

Washington, DC 20007-5116

202-424-7500

Attorneys for

Kansas City Fibernet, Inc.

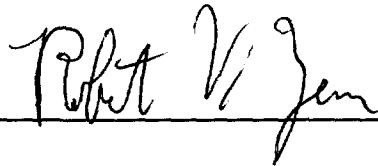
and

Focal Communications Corporation

Dated: July 10, 1997

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMENTS OF KANSAS CITY  
FIBERNET, INC. AND FOCAL COMMUNICATIONS CORPORATION IN SUPPORT OF  
PETITION FOR EXPEDITED RULEMAKING ON OPERATIONS SUPPORT SYSTEMS  
were served this 10th day of July 1997 by first class mail, postage prepaid, or by hand delivery,  
to each on the attached service list. (Those served by hand delivery are marked with an  
asterisk(\*).)

  
\_\_\_\_\_

[Original + 14]

Secretary \*  
Federal Communications Commission  
1919 M Street, N.W., Suite 222  
Washington, DC 20554

ITS, Inc. \*  
1231 - 20th Street, N.W.  
Washington, DC 20036

Anne K. Bingaman, Esquire  
Douglas W. Kinkoph, Esquire  
LCI International Telecom Corporation  
8180 Greensboro Drive, #800  
McLean, VA 22102  
llllllllllllllllllllll

Genevieve Morelli, Esquire  
Executive Vice President, General Counsel  
COMPTEL  
1900 M Street, N.W.  
Washington, DC 20036  
llllllllllllllllllllll

Eugene D. Cohen, Esquire  
Bailey Campbell PLC  
649 North Second Avenue  
Phoenix, AZ 85003  
llllllllllllllllllllll

Rocky Unruh, Esquire  
Morgenstein & Jubelirer  
Spear Street Tower  
San Francisco, CA 94105  
llllllllllllllllllllll